

EVIDENCE — Proving Prior Convictions, in General — Revised 3/2010

The legislature has enacted statutes enhancing the sentences to be imposed on repeat offenders, that is, defendants who have historical prior felony convictions. A.R.S. § 13-703. A.R.S. § 13-105(22) defines "historical prior felony conviction." That statute provides that some historical prior felony convictions may not be alleged as enhancing factors unless the offense leading to the conviction occurred within the last five or ten years. However, some types of historical prior felony convictions may be used to enhance a defendant's sentence no matter how long ago they occurred, including aggravated DUI; dangerous crimes against children; and all offenses that mandated imprisonment when they were committed. See *Zamora v. Reinstein*, 185 Ariz. 272, 915 P.2d 1227 (1996).

A.R.S. § 13-703(N) provides that "The penalties prescribed by this section shall be substituted for the penalties otherwise authorized by law if the previous conviction . . . is charged in the indictment or information and admitted or found by the court." Thus, to enhance a defendant's sentence with a historical prior felony conviction, the State must first charge the defendant with the prior; then the court must determine that the defendant in fact has the prior conviction, based on either his admission or on proof presented by the State. Note that under the statute, the determination whether the defendant has a prior is made by the court, not by the jury. Because an allegation of a historical prior felony conviction is a sentencing factor, the defendant has no constitutional right to a jury trial on the issue. *State v. Quinonez*, 194 Ariz. 18, 20, ¶ 9, 976 P.2d 267, 269 (App. 1999).

A defendant may admit his historical prior felony convictions as part of a guilty plea. Rule 17.6, Ariz. R. Crim. P., states, “Whenever a prior conviction is charged, an admission thereto by the defendant shall be accepted only under the procedures of this rule, unless admitted by the defendant while testifying on the stand.”

Therefore, before a Superior Court judge takes an admission of a prior from a defendant, the defendant must appear in open court, Rule 17.1(a)(1); the court must advise the defendant of the consequences of his admission and the rights he waives by admitting, Rule 17.2; and the court must find that the admission is made knowingly, voluntarily, and intelligently, Rule 17.3.

If the defendant does not admit the historical prior felony conviction, the State must prove the prior conviction. To do so, the State must prove two facts beyond a reasonable doubt: first, that the alleged crime was committed, and second, that the defendant committed it. *State v. Penny*, 102 Ariz. 207, 208, 427 P.2d 525, 526 (1967); *State v. Forteson*, 8 Ariz. App. 468, 474, 447 P.2d 560, 566 (1968); *State v. Terrell*, 156 Ariz. 499, 503, 753 P.2d 189, 193 (App. 1988), *superseded by statute on other grounds, as noted in State v. Cons*, 208 Ariz. 409, 94 P.3d 609.

Court records are the most common and readily accepted form of proof for a prior conviction. In *State v. Hunter*, 137 Ariz. 234, 669 P.2d 1011 (App. 1983), the Arizona Court of Appeals ruled that producing documents which included the dates of convictions and the sentences imposed were sufficient to prove prior convictions. *Id.* at 239, 669 P.2d at 1015. However, it is imperative that the State prove beyond a reasonable doubt that the current defendant is the same person who was previously convicted. *Terrell*, 156 Ariz. at 503, 753 P.2d at 193.

In *State v. Hauss*, 140 Ariz. 230, 231, 681 P.2d 382, 383 (1984), the Arizona Supreme Court held that:

The proper procedure to establish the prior conviction is for the state to offer in evidence a certified copy of the conviction [rules omitted] * * * and establish the defendant as the person to whom the document refers. See *State v. McGuire*, 113 Ariz. 372, 555 P.2d 330 (1976); *State v. Biscoe*, 112 Ariz. 98, 537 P.2d 968 (1975).

(quoting *State v. Lee*, 114 Ariz. 101, 105-106, 559 P.2d 657, 661-62 (1976)).

In *Hauss*, the Arizona Supreme Court affirmed the holding in *Lee*, "subject to two very limited exceptions":

First, a former conviction may be sufficiently established by an accused's admission of the conviction while testifying in court, *State v. Pacheco*, 121 Ariz. 88, 588 P.2d 830 (1978). Second, the documentation requirement will be excused where the state can show that its earnest and diligent attempts to procure the necessary documentation were unsuccessful for reasons beyond its control and that the evidence introduced in its stead is highly reliable. . . . With respect to the exceptions, the first is justified by judicial economy; there is no need to prove a prior conviction by extrinsic evidence where the accused has, under oath, admitted it. The second exception is justified by both judicial economy and the practical realities of our bureaucratic structure; administrative delays in furnishing certified copies of minute entries and ministerial misunderstandings must not be used to delay disposition of criminal cases where there is highly reliable non-documentary evidence that substantiates allegations of prior convictions.

Id. In *Hauss*, the Arizona Supreme Court upheld the proof of a prior conviction when it was established by the testimony of a probation officer that twenty days earlier, the probation officer had been present in court with the defendant when the conviction was entered. However, the Court warned that "In the future . . . we will not, and trial courts must not, consider the reliability and sufficiency of non-documentary evidence offered to establish the fact of a prior conviction absent a showing by the state that its earnest and

diligent efforts to obtain documentary evidence were unsuccessful for reasons beyond its control." *Id.* at 232, 681 P.2d at 384.

When, despite "earnest and diligent efforts," documentary evidence of a prior conviction is unavailable, the State is "entitled to go to any reasonable source of evidence." *State v. Norgard*, 6 Ariz. App. 36, 39-40, 429 P.2d 670, 673-674 (1967). In *State v. Alexander*, 108 Ariz. 556, 568, 503 P.2d 777, 789 (1972), for example, the State established the fact of the defendant's prior conviction by calling his former attorney to testify about it. The defendant complained that calling his attorney to testify violated the attorney-client privilege; but the Court held that the procedure did not violate the privilege since the attorney was only questioned about the existence and nature of the conviction, not about anything the defendant had told him about the offense.